No. 91-33

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LEONARD CASTIGLIONE, ANTHONY DONATO, and
WILLIAM HENDRICKS,
Petitioners,

vs.

JACK LEE HARRIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS FOR REVIEW:

(1) Does the purely objective standard set out in *Harlow v Fitzgerald*, 457 U.S. 800 (1981) for resolution of the issue of qualified immunity apply in cases where the plaintiff can only obtain damages if the official's culpable state of mind is established?

(2) Did the Ninth Circuit apply the law at a level of generality prohibited by *Anderson v Creighton*, 483 U.S. 635 (1987)?

PARTIES TO PROCEEDING IN NINTH CIRCUIT COURT OF APPEALS:

The names of all parties appear in the caption of the case. The CITY OF PITTSBURG was the only Defendant not a party to the individuals' motion for summary judgment based on qualified immunity.

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No. _____

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LEONARD CASTIGLIONE, ANTHONY DONATO, and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS:

(1) Memorandum and Order, No. C-86-2101 MHP, filed July 7, 1989 (United States District Court, Northern District of California).

(2) Memorandum, No. 89-16024, filed March 18, 1991 (United States Court of Appeals for the Ninth Circuit).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED:

(1) The date of entry of the judgment sought to be reviewed was March 18, 1991.

(2) Jurisdiction of United States Supreme Court:

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE:

(1) 42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2) United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

(3) United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens for the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE:

In May 1985, Plaintiff was terminated from his position as police sergeant for the Pittsburg Police Department. The grounds for his termination were set out in a memorandum entitled Notice of Intent to Terminate dated April 26, 1985. See Notice of Intent to Terminate, Appendix at Page A-19. Plaintiff does not dispute the grounds for termination, but only the subjective motivation for his termination. He claims the grounds for his termination were a pretext and that Defendants' motive was to retaliate against Plaintiff for the exercise of his First Amendment rights.

Plaintiff brought an action in the United States District Court for the Northern District of California in San Francisco under 42 U.S.C. Section 1983, claiming that the termination violated his First and Fourteenth Amendment rights. The individual Defendants named in this claim are Leonard Castiglione, Pittsburg Police Chief; Anthony Donato, City Manager of Pittsburg; and William Hendricks, Pittsburg Police Sergeant (now Lieutenant).

These Defendants brought a motion for summary judgment in September 1987 on the grounds that, as a matter of law, they were entitled to qualified immunity.

The District Court denied Defendants' motion on the grounds that in May 1985, the law was clearly established that a public

employee could not be terminated in retaliation for exercising his First Amendment rights and that a disputed issue of fact existed as to the motivation for Plaintiff's termination. The Court also ruled that Plaintiff's Fourteenth Amendment claim presented a triable issue of fact regarding Defendants' intent.

Defendants appealed the District Court's decision to the Ninth Circuit Court of Appeals, arguing that: (1) the law was not clearly established that Plaintiff's termination was unlawful under the First or Fourteenth Amendments where the particular circumstances are analyzed according to *Anderson v Creighton*, 483 U.S. 635 (1987); and (2) no disputed issue of fact precluded summary judgment because Plaintiff did not dispute the *reasons* for his termination and Defendants' *subjective* motivation is irrelevant under *Harlow v Fitzgerald*, 457 U.S. 800 (1981).

The Ninth Circuit affirmed the District Court, holding that the law was clearly established that Plaintiff could not be terminated in retaliation for exercising his First Amendment rights, and a disputed issue of fact existed regarding Defendants' subjective motivation. The Ninth Circuit did not address the Fourteenth Amendment issue.

Defendants appeal to this Court because both the District Court and the Ninth Circuit erred by (1) considering the subjective motivation of Defendants in direct contradiction of the rule of *Harlow v Fitzgerald, supra*, 457 U.S. 800; and (2) applying the law to the facts of this case at a level of generality prohibited by *Anderson v Creighton, supra*, 483 U.S. 635 and thereby ruling that the law was clearly established when it was not.

REVIEW OF STATE COURT JUDGMENT:

Not applicable.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE:

The United States District Court for the Northern District of California had federal jurisdiction over this case under 28 U.S.C.

Section 1331; the United States Court of Appeals for the Ninth Circuit had jurisdiction over the case under 28 U.S.C. 1291.

REASONS FOR REVIEW:

Defendants seek review by this Court because the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

This Court has not decided the issue of whether a dispute over a public official's state of mind makes summary judgment on qualified immunity grounds improper where the underlying constitutional violation requires that the official has acted with a culpable state of mind. However, in their dissenting opinion in *Anderson v Creighton, supra*, 483 U.S. 635, Justices Stevens, Brennan, and Marshall stated that *Harlow* may be inapplicable in cases where "the plaintiff can obtain damages if the official's culpable state of mind is established." *Id.*, 483 U.S. at 656, fn. 12, citing *Allen v Scribner*, 812 F.2d 426 (9th Cir. 1989).

The Ninth Circuit has ruled that summary judgment on the ground of qualified immunity is improper where a disputed issue of fact exists regarding the subjective motivation of the defendant, where the underlying constitutional violation requires a culpable state of mind. See *Allen v Scribner, supra*, 812 F.2d at 436; *Soranno's Gasco, Inc. v Morgan*, 874 F.2d 1310 (9th Cir. 1989). The Ninth Circuit followed *Allen* and *Soranno's Gasco* in the instant case. The Ninth Circuit erred in light of the principles set forth by this Court.

In *Harlow v Fitzgerald*, this Court held that a defendant's entitlement to qualified immunity must be decided by determination of the *objective* reasonableness of the official's conduct. *Id.*, 457 U.S. at 818. The official's *subjective* beliefs are irrelevant. *Id.*, 457 U.S. at 817-818.

If *Harlow* does not apply to cases where the public official's state of mind is an element of the alleged underlying constitutional violation, the protection that *Harlow* sought to provide to public officials will be effectively lost in First and Fourteenth

Amendment cases (such as the instant case) as well as in any case where a culpable state of mind is an element of the alleged constitutional violation. Thus, this important question should be decided by this Court.

Furthermore, the resolution of this question by the Ninth Circuit, that summary judgment is precluded where a disputed issue of fact exists as to a defendant's motive, conflicts with applicable decisions of this Court. In *Harlow*, a First Amendment case, this Court stated that the subjective component of the qualified immunity analysis referred to " 'permissible intentions.' " *Harlow, supra*, 457 U.S. at 815. This Court then expressly rejected this component. *Id.*, 457 U.S. at 815-818. *Anderson v Creighton, supra*, reaffirmed this Court's determination that subjective beliefs are irrelevant. *Id.*, 483 U.S. at 641. The relevant question is whether a reasonable official "*could*" have believed his conduct to be lawful. *Id.*

The Ninth Circuit's holding in *Soranno's Gasco, Inc. v Morgan, supra*, directly contradicts *Anderson v Creighton. Soranno's Gasco* held that a disputed issue of fact regarding the official's motivation precluded summary judgment. *Id.*, 874 F.2d at 1315. The court stated that although the official *could* have denied a permit to the plaintiff, whether he *would* have done so absent the plaintiff's political expression presented an issue of fact for the jury. *Id.*, 874 F.2d at 1316. This was an impermissible resurrection of the subjective element which *Harlow* abolished.

The Ninth Circuit followed *Allen* and *Soranno's Gasco* and denied Defendants' motion for summary judgment in the instant case. That decision conflicts with this Court's rulings in *Harlow* and *Anderson.*

Finally, the Ninth Circuit applied the law at a level of generality prohibited by *Anderson v Creighton, supra*, 483 U.S. 635. First, the court's ruling that the law was clearly established that Defendants could not terminate Plaintiff in retaliation for the exercise of his First Amendment rights was not arrived at by balancing the employer's interest against that of the employee's

(i.e. disruption in the workplace versus whether Plaintiff spoke as a concerned citizen regarding a matter of public concern) or a case by case basis, as set out in *Pickering v Board of Education*, 391 U.S. 563 (1968). Second, the court did not consider Defendants' reliance on the advice of counsel as a circumstance relevant to the issue of whether the law was clearly established. Third, the court did not consider whether the law was clearly established regarding the specific circumstances of Defendant Hendricks, who had no authority to terminate Plaintiff, and merely followed the orders of his superiors in preparing a report of the incident.

Anderson v Creighton requires that the court examine the particular circumstances. *Id.*, 483 U.S. at 640. It is error to assert only the general right of the Plaintiff and hold that the law was clearly established.

Therefore, Defendants' Petition for Writ of Certiorari should be granted.

DATED: June 12, 1991

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Appendix A

Not for Publication

In the United States Court of Appeals

For the Ninth Circuit

Jack Lee Harris,
Plaintiff-Appellee,

v.

City of Pittsburg,
Defendant,

and

Leonard Castiglione, individually and in his capacity as Chief of Police for the City of Pittsburg; Anthony Donato, individually and in his capacity as City Manager of the City of Pittsburg; William Hendricks,
Defendants-Appellants.

No. 89-16024

D.C. # CV-86-2101-MHP

Memorandum*

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding
Argued and Submitted December 10, 1990
Pasadena, California

Before: Sneed, Schroeder, and Canby, Circuit Judges.

Plaintiff Jack Harris, formerly a sergeant with the Pittsburg Police Department, filed this action against the Pittsburg Police Chief, the City Manager, and a fellow police officer. Harris claims that his dismissal from the police force violated his rights under 42 U.S.C. § 1983 and the equal protection clause. The defendants moved for summary judgment, claiming they enjoyed qualified immunity from liability. The district court denied this motion,

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* This dispostion is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

and the defendants now appeal pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

The defendants claim that, as municipal government officials, they are immune from section 1983 liability, and that the district court therefore erred in denying their motion for summary judgment. The Supreme Court has held that government officials enjoy qualified immunity from section 1983 liability for actions performed in the course of their official duties. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To survive a motion for summary judgment on qualified immunity grounds, the plaintiff must allege a violation of clearly established law, and there must exist a genuine issue of fact as to whether the defendant committed the relevant acts. *Mitchell*, 472 U.S. at 526 (citations omitted).

A genuine issue of fact exists with regard to the actual subjective motivation of the defendants. There is evidence in the record to permit a trier of fact to infer that the motivation for Harris' discharge, as he contends, was to punish him for his speech; the defendants claim the discharge was motivated by Harris' violation of departmental rules and policies. The defendants' motive in firing Harris is a substantive element of the constitutional violation alleged, and is a disputed question of fact that must be presented to the jury. Therefore, the district court was correct in holding that summary judgment was not appropriate. *Allen v. Scribner*, 812 F.2d 426, 436 (9th Cir. 1987); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1319 (9th Cir. 1989); *see Pickering v. Board of Educ.*, 391 U.S. 563, 574-75 (1968) (school board cannot terminate teacher in retaliation for critical letter); *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983) (police officer cannot be terminated in retaliation for speech given to city council); *O'Brien v. Town of Caledonia*, 748 F.2d 403, 409 (7th Cir. 1984) (police officer cannot be disciplined for reporting departmental irregularities to authorities); *Brockell v. Norton*, 732 F.2d 664, 669 (8th Cir. 1984) (police dispatcher cannot be terminated in retaliation for violating chain of command to report wrongdoing).

Harris' request for sanctions is denied.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Jack Lee Harris,
Plaintiff,

vs.

City of Pittsburg, et al.,
Defendants.

No. C-86-2101 MHP

MEMORANDUM AND ORDER

This case is before the court on a writ of mandamus from the Ninth Circuit Court of Appeals.[1] The Ninth Circuit directed this court to "enter a written order determining whether the alleged conduct of defendants William Hendricks, Leonard Castiglione and Anthony Donato violated Jacke [sic] Lee Harris' clearly established rights." *Order*, (April 4, 1989) at 1 (citing *Order*, October 22, 1987).

This court finds that defendants' alleged conduct, if proven, violated plaintiff's clearly established rights. Because defendants' assertions of qualified immunity involve a fact-intensive inquiry inappropriate for resolution on summary judgment, the motion for summary judgment is denied.

BACKGROUND

Plaintiff, Sergeant Jack Lee Harris, brought an action under 42 U.S.C. § 1983 against his employer, the City of Pittsburg, California, and several defendants in their individual and official capacities. Defendants moved for summary judgment, which the court granted in part and denied in part. *Order, Harris v. Pittsburg*, (CV-86-2101 MHP, N.D. Cal., August 12, 1987). In the remaining claims, Harris alleged that he was fired in May 1985 for exercising his right to freedom of speech and that by terminat-

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[1] Order, *Hendricks, v. United States District Court*, (9th Cir., No. 87-7443, April 4, 1989, served June 19, 1989).

ing him defendants violated his rights under the first amendment. Harris also alleged violation of his right to equal protection and due process under the fourteenth amendment. Finally, Harris alleged pendent state claims for wrongful termination and bad faith breach of the implied covenant of good faith and fair dealing.

Shortly before trial, at the hearing on defendants' motion for summary judgment and plaintiff's motion to strike affidavits, defendants moved to dismiss the claims against the remaining individual defendants on the theory of "good faith" immunity.[2] *See* Tr. I at 27. The court refused to consider the defendants' new theories without written briefs. *Id.* at 28. With the trial date less than two months away, the court allowed the parties to submit short pretrial briefs on the issue of qualified immunity. *Id.* at 36.[3]

Defendants submitted a brief which they characterized as a "motion for summary judgment" based on "good faith" immunity. However, the court's ruling did not allow the parties to embark upon a new round of summary judgment motions, and it did not in any way contemplate a motion like that of defendants which contained facts and theories not previously heard. The parties argued the issue of qualified immunity at the pretrial hearing. *See* Transcript of Proceedings, September 10, 1987 ("Tr. II"). In support of their motion defendants argued that they

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[2] In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court uses the terms "good faith" or qualified immunity. However, the Court stressed that the inquiry was based primarily on objective factors. To avoid any confusion, this court uses the term "qualified immunity" when discussing the threshold issue to be resolved at the summary judgment stage under *Harlow*. 457 U.S. at 818.

[3] Defendants were not given leave to file a motion for summary judgment at that late date. *See* Transcript, July 20, 1987 ("Tr. I") at 36. Their papers were incorrectly characterized as a motion for summary judgment in an attempt to bring them within the guidelines set out by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As such, defendants' motion is an inappropriate vehicle for the interlocutory appeal allowed by *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

relied on superiors' orders, the advice of counsel,[4] the advice of other police chiefs, and that their conduct was therefore reasonable.

This court had already determined that there existed clearly settled law that plaintiff's communications were protected speech at the time of his termination. *Order, Harris v. Pittsburg*, (CV-86-2101 MHP, N.D. Cal., August 12, 1987). Since the issues raised by defendants were based on a fact-intensive record, the court issued an oral order denying defendants' "self-styled" motion. Tr. II at 33.[5]

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[4] The court notes that by asserting the defense of reliance on advice of counsel, defendants waive the privilege associated with attorney/client communications. *See* 8 J.H. Wigmore, *Evidence* § 2327 (1961 & Supp. 1987) (at 564 & 156); *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) (voluntary disclosure of the content of a privileged attorney communication, even if inadvertent, "constitutes waiver of the privilege as to all other such communications on the same subject").

[5] The court's denial of defendants' motion for summary judgment based on "good faith" immunity was grounded on the principle that whether the defendants' conduct was reasonable was a fact-based question not capable of resolution on summary judgment. The court explicitly stated:

> On the immunity issue that you raised by summary judgment, although I like to get rid of things on summary judgment, it is a fact question. Despite what *Anderson* . . . say[s] it is, this is not one of those cases where it can be disposed of on summary judgment. There are facts of [sic] dispute as to the reasonableness of [defendants'] conduct.

Tr. II at 11-12.

Additionally, the court was concerned with the defendants' assertion that their conduct was reasonable because they had relied on advice of counsel in firing plaintiff. If evidence of reliance was to be introduced, it would necessitate calling the attorney who had provided the advice, and thus the attorney/client privilege would have to be waived. At the time of the hearing, the attorney had not yet been deposed.
TR. II at 13.

Defendants filed a Notice of Appeal relying on *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that a district court's denial of a claim of qualified immunity, *to the extent it turns on an issue of law*, is an appealable final decision under 28 U.S.C. § 1291). As apparent from the following discussion, the court's ruling turned on the fact that the law as it existed in 1985 unquestionably established that defendants' alleged conduct violated plaintiff's clearly established rights. The new grounds raised by defendants did not relate to the objective "clearly settled law" standard, but to defendants' subjective reliance upon advice and orders that involve disputed issues of fact. Therefore, whether or not defendants acted reasonably and in good faith in the instant case is a question for the trier of fact. Denial of defendants' motion for summary judgment on the basis of qualified immunity was, therefore, proper under Federal Rule of Civil Procedure 56(c).[6]

LEGAL STANDARD

Assuming, arguendo, that the motion before the court was properly a motion for summary judgment, the court resolves the issues presented under the standards for such motions. Summary judgment is appropriate only if there are no disputed genuine issues of material fact. Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). The court's function, however, is not to make credibility determinations. *Id.* at 249. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W.*

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[6] The rule states in pertinent part: "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982) where the Court stated that courts must look at the record and draw all inferences in favor of the opposing party on a motion for summary judgment.

Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987).

When a defendant in a civil rights action raises the defense of qualified immunity,[7] the court may determine on summary judgment the objective reasonableness of the public official's conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has held that "[s]tate officials cannot be held liable for damages under section 1983 unless their conduct violates a clearly established constitutional right." *Wood v. Ostrander*, ____ F.2d ____, No. 87-3924, slip op. 6879, 6892 (9th Cir. June 27, 1989) (citing *Davis v. Scherer*, 468 U.S. 183, 194 (1984), *reh'g denied*, 468 U.S. 1226 (1984)).

A court must use the objective, "reasonable person" standard to ascertain if a defendant knew or should have known that the rights at issue were "clearly established." *Harlow*, 457 U.S. at 818-19; *see also Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986). "The decisive fact is not that [the official's] position turned out to be incorrect, but that the question was open at the time he acted." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). The court may determine whether "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

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[7] The claim of qualified immunity is an affirmative defense which the defendants have the burden of pleading. *Gomez v. Toledo*, 446 U.S. 635 (1980); *Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986). Failure to plead qualified immunity amounts to a waiver of the defense. *Kelson v. City of Springfield*, 767 F.2d 651, 657 (9th Cir. 1985). Once plead, the burden of pleading the defense lies with the official asserting it. *Benigni v. Hemet*, ____ F.2d ____, No. 87-5622, slip op. 6295, 6310 (9th Cir. June 15, 1989) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)); *see also Harris v. City of Roseburg*, 664 F.2d 1121, 1129 (9th Cir. 1981) (good faith is an affirmative defense which must be proved by the official).

DISCUSSION

In support of their argument for qualified immunity, defendants rely primarily on the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the United States Supreme Court created an objective test to resolve the question of a government official's qualified immunity from civil liability. *Id.* at 818.

> *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability. . . .

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original). If a court finds that the law was clearly established, the defendants are not shielded from suit by qualified immunity, since reasonably competent public officers should know the law governing their conduct. *Harlow*, 457 U.S. at 818-19; *see also Lum v. Jensen*, ____ F.2d ____, No. 87-2896, slip op. 5796, 5800 (9th Cir. May 31, 1989).

However, a public official may be allowed to plead and prove "extraordinary circumstances" such that he or she neither knew nor should have known of the relevant legal standard. In such a case, the defense of qualified immunity may be sustained. *Id.* at 819. Even so, the defense must "turn primarily on objective factors." *Id.*

Defendants' claims of qualified immunity present disputed material facts and are therefore merely a defense and not an immunity from suit. *See Mitchell*, 472 U.S. at 526. With critical material facts in dispute, on the eve of trial, summary judgment was inappropriate. *See Wood v. Ostrander*, slip op. at 6902 (holding that if plaintiff were able to prove at trial the facts she alleged in support of her section 1983 action, defendant officer was not entitled to claim qualified immunity based on a reasonable officer standard); *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987) (district court's denial of qualified immunity was not immediately appealable where it did not present a purely legal

issue separate from the merits, but presented a disputed factual issue).[8] Consequently, denial of defendants' motion was appropriate.

I. First Amendment Claims

Harris alleged that he was fired in May 1985 in violation of the first amendment for exercising his right of freedom of speech. Harris had spoken out against corruption and favoritism that allegedly plagued the Pittsburg Police Department. The exercise of this right, he claims, eventually cost him his job.

By May 1985, well-established Supreme Court precedent prohibited employers from firing employees who exercised their right to criticize their employer and spoke out on matters of public concern, such as corruption in the workplace. *See, e.g., Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (stating that it is important to achieve a balance between the interests of the teacher employee, "as a citizen, in the community upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"); *see also Order, Harris v. Pittsburg,* (CV-86-2101 MHP, N.D. Cal., August 12, 1987).

Furthermore, by May 1985 this circuit had also found that " 'policemen, like teachers and lawyers [. . .] are not relegated to a watered-down version of constitutional rights.' " *Kannisto v. City and County of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (quoting *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967)). A police officer's right to first amendment protection is "substantial because, as a member of the department, he is a person 'extraordinarily able to inform the public of deficiencies in this important governmental department.' " *Kannisto*, 541 F.2d at 843; *Cf. Pickering*, 391 U.S. at 572 (members of a specific community are most likely to have

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[8] *See also Kovats v. Rutgers*, 822 F.2d 1303, 1313-14 (3d Cir. 1987) (where factual issues of merit and qualified immunity issue were intertwined, denial of summary judgment based on qualified immunity was appropriate).

informed and definite opinions about that community and must be able to speak out without fear of retaliatory reprisal); *see also Leonard v. Columbus*, 705 F.2d 1299, 1305 (11th Cir. 1983), *reh'g denied*, 716 F.2d 914, *cert. denied sub nom. Columbus v. Leonard*, 468 U.S. 1204 (1984) (first amendment violated when Black police officers were fired for failing to obey a city resolution requiring the flag patch on police uniforms).

Indeed, in a case directly on point, this circuit has held that when an employee was terminated in May 1985, the law clearly established that "a government employee could not with impunity be discharged in retaliation for the exercise of his first amendment rights." *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1211-12 (9th Cir. 1988) (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1987) ("a discharged government employee may 'establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms' ") and *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech"). *See also Mabey v. Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976) (retaliatory termination based on employee's exercise of first amendment rights is unlawful).

Additionally, at the time Harris was fired, other circuits and California courts had held that the breach of the chain of command by a confidential report to an investigative agency merited first amendment protection. *See, e.g., O'Brien v. Town of Caledonia*, 748 F.2d 403, 409 (7th Cir. 1984) (enjoining retaliatory discipline imposed upon a police officer who reported departmental irregularities to authorities); *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984) (quoting *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063 n.5 (8th Cir. 1979) (enforcing the chain-of-command rule "against an employee seeking to criticize the very superior empowered to review [the matter] would impermissibly chill first amendment rights"); *Czurlanis v. Albanese*, 721 F.2d 98, 106 (3rd Cir. 1983) ("[a] policy which could compel public employees to route complaints about poor departmental practices to the very officials responsible for those practices would imper-

missibly chill such speech"); *Unruh v. City Council*, 78 Cal. App. 3d 18, 29 n.6 (1978) (confidential disclosures by a police officer which are not made recklessly or in bad faith are constitutionally protected); *Meester v. Davies*, 11 Cal. App. 3d 342, 346 (1970) (police officers have a duty to report to the district attorney or Attorney General any suspected wrongdoing which may involve their superiors).

A. Qualified Immunity

Defendants argue that under *Anderson v. Creighton*, 483 U.S. 635 (1987), this court must decide whether the law in effect at the time of the conduct established that the particular conduct in question was unlawful so that a reasonable official would understand that his or her conduct was unlawful. However, even if the facts, in this case, are as asserted by the defendant, the defendant's actions violated clearly established law and are therefore not within the scope of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As stated above, this court has already held that the law was fully established at the time of the alleged violations by defendants. *See Order, Harris v. Pittsburg*, (CV-86-2101 MHP, N.D. Cal., August 12 1987) at 8-12.

The Ninth Circuit has held that the "existence of [public officials'] reasonable belief that their conduct was lawful, viewed in the light of clearly established law . . . is a question for the trier of fact." *Schlegel v. Bebout*, 841 F.2d 937, 945 (9th Cir. 1988). *See also Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1467 (9th Cir. 1984) (although inquiry whether legal rights are settled may often be best resolved by the trial judge, "the existence of a reasonable belief that a search is lawful, viewed in light of the 'settled' nature of the law, is a question for the trier of fact"); *cf. Wood v. Ostrander*, slip op. at 6902, 6892 (summary judgment not appropriate where plaintiff raised genuine issues of fact as to reasonableness of defendant officer's conduct; also stating that officer is entitled to summary judgment based on qualified immunity if he can show that as a reasonable officer he could have believed his actions were constitutional even if they were not) (citation omitted).

Defendants further argue that their conduct met the test of reasonableness since they relied on advice of counsel and the orders of their superiors. They argue that no laws clearly prohibited such reliance. This misconstrues the test set out in *Anderson* and *Harlow*, which looks to the law at the time of the alleged constitutional violation, not the burgeoning law of "good faith" or qualified immunity. Instead, defendants framed their immunity argument solely by reference to subjective factors.[9]

Additionally, defendants did not raise the defense of qualified immunity in the manner contemplated by the Supreme Court in *Harlow*. *Harlow* envisages that the defendant will be cognizant of and raise the defense before discovery takes place. Since a court's inquiry on qualified immunity turns on the existence of a clear legal standard, no discovery would be required. *Id.* at 818. Once a district court determines that defendant took action that a reasonable officer could not have believed lawful, and defendant claims that his conduct was such that a reasonable official could have believed lawful, then the court may allow further discovery on the immunity issue. *Anderson v. Creighton*, 483 U.S. 635, 646-7 n.6 (1987). One court has held that when a constitutional claim (such as the equal protection violations asserted in this case) requires a showing of intent, discovery may be necessary on the intent issue before the qualified immunity issue may be resolved. *Martin v. District of Columbia Metro. Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987), *reh'g denied*, 824 F.2d 1240 (D.C. Cir. 1987) *opinion reinstated on reconsideration sub nom. Bartlett on behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987).

In the instant case, defendants raised the defense of qualified immunity on the eve of trial. Discovery was essentially complete. Only after the court had denied the motion for summary judgment on the issue of qualified immunity did counsel depose the attorney upon whose advice defendants allegedly relied. Plaintiff had no opportunity to conduct meaningful discovery on the issue.

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[9] The court, as the trier of fact, was asked to ponder numerous fact-intensive questions such as: what information did defendants give their attorney? Upon what did defendants' attorney base his advice? What did defendants ask the other police chiefs? Exactly what was the response?

Additionally, by their submission of supplemental facts and deposition extracts, *see* Supplemental Statement of Facts in Support of Motion of Hendricks, Castiglione, and Donato for Good Faith Immunity, October 29, 1987, defendants tacitly acknowledged that their qualified immunity defense requires a factual inquiry. *See, also Schwartzman v. Valenzuela*, 846 F.2d 1209, 1211-12 (9th Cir. 1988) (affirming denial of summary judgment where plaintiff, fired in May 1985, had stated a claim and presented evidence from which a jury could reasonably infer that he had been fired for exercising his first amendment rights.)

B. Reliance on Advice of Counsel

Under *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), public officials who prove the existence of "extraordinary circumstances" such that they neither knew nor should have known the legal standard for their conduct may be entitled to qualified immunity. Defendants argue that their reliance on the advice of counsel raises their conduct to this level of extraordinary circumstances considered by *Harlow* which would entitle them to the qualified immunity defense.

There has been some suggestion that reliance on counsel may constitute extraordinary circumstances. *See Watertown Equip. Co. v. Northwest Bank Watertown, N.A.*, 830 F.2d 1487, 1495 (8th Cir. 1987) *appeal denied, cert. denied sub nom. Green v. Watertown Equip. Co.*, ___ U.S. ___, 108 S. Ct. 1723 (1988); M. Schwartz and J. Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees*, 167 (1986) (official's reliance on advice of counsel may be a relevant, although not dispositive, factor in determining whether he or she acted in good faith, though higher-ranking officials and officers with access to counsel may be held to a higher standard of knowledge than subordinates.)

Case law discussing defendants' position demonstrates that reliance on advice of counsel is not a defense when a clearly established right is involved. Constitutional rights exist independently of an official's personal knowledge of them. Although it may be a factor bearing on the question of qualified immunity, reliance on advice of counsel alone will not satisfy an official's burden of acting reasonably. *Watertown Equip. Co.*, 830 F.2d at

1495 (advice of counsel was a pertinent factor but not controlling, since defendants did not confront a "perilous situation"); *Tanner v. Hardy*, 764 F.2d 1024, 1027 (4th Cir. 1985); *Wentz v. Klecker*, 721 F.2d 244, 247 (8th Cir. 1983); *cf. Arnsberg v. United States*, 757 F.2d 971, 982 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986) (reliance on advice of counsel supported immunity because reasonable attorneys could differ in their interpretations of the law, or the threshold issue of the existence of "clearly established" law.)

Lastly, even if defendants can prove that they are entitled to immunity since their conduct was reasonable because they relied upon advice of counsel, the Ninth Circuit has held that "[t]he trial court's determination of reasonable reliance is a finding of fact. . . ." *Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986). *See also Schlegel v. Bebout*, 841 F.2d 937, 945 (9th Cir. 1988); *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1466-67 (9th Cir. 1984). At this stage, the court finds that there are significant disputed issues of fact regarding whether or not there was reasonable reliance. Summary judgment on this ground is therefore denied.

C. Following Superiors' Orders

Defendant Hendricks claims that he was acting on the orders of his superiors, and that he is therefore entitled to the defense of qualified immunity. Case law rejects this defense. If the actors "knew or should have known that their actions were violating the plaintiffs' constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty." *Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3rd Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth*, 453 U.S. 913 (1981), *reh'g denied*, 453 U.S. 928 (1981); *see also Villanueva v. George*, 659 F.2d 851, 855 (8th Cir. 1981), *appeal after remand sub nom. Villanueva v. Leininger*, 707 F.2d 1007 (8th Cir. 1983); *Putman v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981), *appeal after remand*, 701 F.2d 63 (8th Cir. 1983); *see also Raysor v. Port Auth. of New York and New Jersey*, 768 F.2d 34, 38-9 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986) (rejecting qualified immunity argument since the general tort rule is that an agent is not relieved of liability merely because he or she is acting at the command of a principal,

citing Restatement (Second) of Agency § 343 comments b, d (1958)); *Busche v. Burkee*, 649 F.2d 509, 517 (7th Cir. 1981), *cert. denied sub nom. Burkee v. Busche*, 454 U.S. 897 (1981) (rejecting policeman's argument that he be relieved of personal responsibility because he was acting subject to his superior's orders); *but see Lowe v. Letsinger*, 772 F.2d 308, 313-14 (7th Cir. 1985) (on remand, court would allow clerk to bring evidence of "extraordinary circumstances" to establish qualified immunity defense, since he allegedly acted at the behest of a judge in concealing a decision).

Defendants rely upon *Vela v. White*, 703 F.2d 147 (5th Cir. 1983) to argue that defendant Hendricks should be immune since he was merely following superiors' orders. The Fifth Circuit in *Vela* affirmed the district court's findings of fact and conclusions of law issued after trial, in which one defendant police officer was found immune under a good faith defense from suit alleging unlawful arrest. 703 F.2d at 152. The district court concluded that qualified immunity shielded the officer following superior's orders since the officer was young and inexperienced. *Id.* The defendant who ordered the arrest was found subject to suit. *Id. See also id.* at 150 (no immunity for official who violated clearly established law, regardless of subjective mental state).

Again, the nature of the "reliance on orders of a superior" defense, by definition, requires a factual inquiry and is inappropriate for resolution on summary judgment as contemplated by *Harlow. See Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986).

II. Equal Protection Claims

Harris also alleged violation of his right to equal protection under the fourteenth amendment. Harris alleged that he received disproportionately harsh discipline for his alleged deviation from department rules, while other similarly situated officers had received little or no discipline. Defendants allege a qualified immunity defense to this claim as well.

Disparate treatment of similarly situated individuals has long been held to violate the equal protection clause, unless a govern-

ment entity can prove that the distinctions have a rational basis. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Distinctions must be reasonable and rest on grounds having a fair and substantial relation to the object being regulated. *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). *See also Washington v. Davis*, 426 U.S. 229 (1976) (successful equal protection claim requires a showing of purposeful discrimination).

Employees who have been subjected to such disparate treatment have long been able to sustain a suit against their employers for equal protection violations. *See, e.g., Thomas v. New Orleans*, 687 F.2d 80, 82-4 (5th Cir. 1982) (upholding jury award to police officer who claimed equal protection violations when he complained of a "widespread and invidious 'blue curtain' within the New Orleans police force" which created a code of silence and punished those who violated it); *Ciechon v. Chicago*, 686 F.2d 511, 522 (7th Cir. 1982) (equal protection rights violated when two paramedics equally responsible for patient assessment and treatment were intentionally treated differently); *Smith v. Georgia*, 684 F.2d 729, 736 (11th Cir. 1982), *appeal after remand*, 749 F.2d 683 (11th Cir. 1983) (an isolated event may violate the right to equal protection if different action is taken against persons similarly situated without showing a rational basis for the disparate treatment); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981), *appeal after remand*, 716 F.2d 847 (5th Cir. 1983) (holding that where three other police officers subject to a departmental character requirement were not denied employment despite their criminal convictions, and plaintiff was denied employment, such denial violated his right to equal protection); *Olshock v. Village of Skokie*, 541 F.2d 1254 (7th Cir. 1976) (equal protection violated when policemen who had engaged in protest action and retained counsel were disciplined differently than those who had not retained counsel).

Defendants' claim of qualified immunity as to the conduct involving plaintiff's fourteenth amendment rights requires that the court determine defendants' intent and is rejected for the same reasons set out in sections I(A) and I(B) *supra*.

III. Pendent State Claims

Harris alleged pendent state claims for wrongful termination, and for bad faith breach of the implied covenant of good faith and fair dealing. Harris argues that his termination was retaliatory in nature and that defendants fired him in violation of public policy for speaking out against corruption in the police department. Defendants also assert a qualified immunity defense to these claims.

The United States Supreme Court has stated that it is essential that state employed teachers "be able to speak out freely . . . without fear of retaliatory dismissal." *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968). *See also Perry v. Sinderman*, 408 U.S. 593, 598 (1972) (nonrenewal of even an untenured employee may not be predicated on his or her exercise of first amendment rights).

California courts have also clearly spoken out against retaliatory discharge as a violation of public policy. *See, e.g., Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 189 (1939) (employer's authority to discharge an at-will employee may be limited by consideration of public policy when an employee has simply complied with his or her legal duty); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176-77 (1980) (employee's action for wrongful discharge in contravention of public policy subjects an employer to tort liability); *Rulon-Miller v. International Business Machs. Corp.*, 162 Cal. App. 3d 241, 252-53 (1984) (court may consider several factors in determining whether employer terminated employee in good faith or bad faith, including whether the termination was for legitimate business purposes or was a pretext).

Defendants' characterization of their defense to these tort claims as the "good faith" immunity defense is not appropriate. Their arguments raise ordinary defenses and, for the reasons stated above, they are rejected.

CONCLUSION

Harlow and its progeny established that an official acting in reliance on unclear or unsettled areas of law enjoys qualified

immunity from suit. *Harlow* does not grant immunity at the summary judgment stage where, as here, an established legal standard governed defendants' conduct, and defendants' immunity claims can only be resolved after a fact-intensive inquiry.

Defendants' alleged conduct, if proven, violated plaintiff's clearly established rights. Defendants' arguments rely on subjective beliefs and factual assertions that are in dispute, and cannot be resolved on summary judgment. Similarly, the asserted defenses to the state law claims involve disputed factual issues. Accordingly, defendants' motion for summary judgment based on the theory of qualified immunity is DENIED.

IT IS SO ORDERED.

Dated: July 7, 1989

MARILYN HALL PATEL

MARILYN HALL PATEL
United States District Judge

Appendix C

PITTSBURG POLICE DEPARTMENT
55 Civic Avenue
Pittsburg, California

Office Correspondence

To: Sergeant Jack Harris

Date: April 26, 1985
From: Len Castiglione
Chief of Police

SUBJECT: NOTICE OF INTENT TO TERMINATE

This correspondence is to formally advise you that I am proposing that you be terminated from your job of Police Officer/Police Sergeant effective Monday, May 6, 1985 at 0900 hours.

The proposed action is to be taken for the following listed grounds;

A. Violation of City of Pittsburg Civil Service Rule 14.2, Subsections;
   1. (8) Wilful violation of Departmental written Rules
   2. (17) Neglect of Duties

B. Violation of City of Pittsburg Department Rules and Regulations;
   1. 1005.7—Neglect of Duty
   2. 1107.1—Duty to Report
   3. 1201.1—Leadership
   4. 1302.2—Operations
   5. 3103.16—Duties of Sergeants
   6. 3406.2—Vice Control
   7. 3406.3—Vice Control
   8. Temporary General Order 26.1—Evidence/Property Procedures

The afore listed grounds are based on the following acts or omissions as set forth in Pittsburg Police Department Internal Personnel Investigation 05P85.

It is found that on February 15, 1985 you failed to give suitable attention to duty regarding properly securing the area in which a

bindle of cocaine was located, within the locker room of the Pittsburg Police Department.

You failed to properly and adequately secure the bindle as evidence; place it into the proper evidence lockers and protect its validity; document the matter; and you wilfully failed to report this matter of serious concern to department superiors, the Captain, or Chief of Police.

Additional foundation of negligence and violation of these rules is borne out by your wilfull failure to report information of concern, to include but not limited to allegations of criminal conduct by officers of the Pittsburg Police Department, to the Captain or Chief of Police, for a period of time, to include but not limited to, December 1983 to present.

You wilfully failed to report to your superior officer, the Captain or Chief of Police, allegations of misconduct or violations of written department rules by officers of the Pittsburg Police Department.

You wilfully failed to report, or take appropriate action in reporting and documenting your suspicions, opinions, beliefs or information that Lieutenant James Banks and/or officers of the Pittsburg Police Department were suspected to be working under the influence of narcotics and/or alcohol, from a period of time to include, but not limited to February 14, 1985, and prior thereto.

You wilfully failed to set a proper example to subordinates in that on February 15, 1985 you directed Patrolman Carl Webb to violate departmental written rules; and for a period of time to include, but not limited to three to four weeks prior to February 15, 1985 you directed Officer Carl Webb and Officer Richard Maxwell to violate written departmental rules, to include, but not limited to, failing to report suspicions or information of concern to the Captain or Chief of Police, and failed to give them proper direction in documenting information of which would be of serious concern to the department.

Your overall failure and wilful negligence to take the appropriate action in these matters, in accordance with written department rules, established past practices and procedures, and Civil

Service Rules, substantiates the validity of the violations and proposed disciplinary action.

Your actions and omissions in reference to these matters is consistant [sic] with your established practice of objection to the administrative directions and orders of the Chief of Police.

It is consistant [sic] to your past practice of failing and wilfully neglecting to observe and follow the chain of command, rules and regulations, and in notifying the administration of the department and Chief of Police, of facts or circumstances of serious concern to the department.

This is borne out and substantiated by your statements, actions and/or omissions in reference to, but not limited to the following incidents; 1984 Maxwell Shooting Arbitration (02P84); your allegations in respect to improperly conducted internal investigations, to include, but not limited to 10P84 (Sergeant Hunt) and 11P84 (Sergeant Hunt); your actions subsequent to the funeral arrest of Archie Lee Thompson (01P81), on March 28, 1981; your actions subsequent to the Departmental Chief's Meeting of April 2, 1981 in reference to the Thompson arrest; your actions in the KRON Television program entitled "Law and Disorder in Pittsburg", aired for five consecutive days between November 15 and November 19, 1982; your actions in Internal Personnel Investigation 14P83 in reference to the complaint of Sandra Garcia; your actions and statements in reference to the January 24, 1984 meeting between yourself, your attorney Mr. Michael Raines, counsel for the City, Mr. Richard Whitmore, the City Manager and myself; the January 1985 departmental Staff Meeting conducted in Oakland California; and your actions in regards to your failure to attend the departmental Chief's Meeting of July 20, 1984 and subsequent disciplinary action taken in that matter, which you currently have in the process of arbitration.

Copies of the documents, your personnel file, and other material which supports the proposed action are available at the Pittsburg Police Department, in the Office of the Chief of Police, for your review upon specific request during regular business hours.

Should you believe this proposed action should not occur you have the right to respond to me either orally or in writing by Friday, May 3, 1985 at 12 noon.

If you wish to respond orally, please contact my secretary so that a specific time can be established for your oral response. Written response shall be forwarded to my office.

Len Castiglione
Chief of Police

LC/vf

Served by: Len Castiglione Received by: Jack Harris

Date: April 26, 1985 Date: April 26, 1985 11:05 a.m.